

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HENRY CHAI :: CASE NO. C-1-03-566
Plaintiff :: (Honorable Judge Dlott)

-vs- :: PLAINTIFF'S MEMORANDUM
THE ALLSTATE INSURANCE CO. :: IN OPPOSITION TO DEFEND-
ANT'S MOTION TO DISMISS
::
Defendant.

:: :: :: :: :: :: :: ::

Defendant has moved to dismiss solely on the basis that the Allstate "Exclusive Agency Agreement" denominates Mr. Chai as an independent contractor. All the cases cited by the Defendant consider not only the contract but the entire employment relationship to determine the status of the parties. The Sixth Circuit has adopted the "economic realities" test where there are several factors to be considered in determining whether a person is an employee or an independent contractor, the most important factor being "the employer's ability to control the job performance and employment opportunities of the plaintiff."

Everman v.Mary Kay Cosmetics, Inc. 967 F.2d 213. see also Equal Employment Opportunity Commission v. The Guardian Life Insurance Company 2001 WL

34105468 (M.D. Tenn.). How the parties denominate themselves is not dispositive.

This issue may not be resolved on a motion to dismiss.

CONCLUSION

The motion to dismiss should be denied.

Respectfully submitted,

/s/ Robert B. Newman

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2003, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to Louise S. Brock, Esq., DINSMORE & SHOHL LLP, 1900 Chemed Center, 255 E. Ninth Street, Cincinnati, Ohio 45202.

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